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CHARLES ELMORE CROPLEY
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 723

REPUBLIC PICTURES CORPORATION,
Appellant,

vs.

FRANCIS KAPPLER

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MOTION TO DISMISS OR AFFIRM

GEORGE B. PORTER,
WALTER F. MALEY,
TED E. HARTUNG,
Counsel for Appellee.

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Statutes Cited

Judicial Code, Section 240(b) (28 U. S. C. A. 347a)	3, 5, 6, 7
Laws of the 50th General Assembly of Iowa, Chapter 267, Section 1	4, 5, 6
Laws of the 51st General Assembly of Iowa, Chapter 222	3

2. That the order allowing appeal was served upon Appellee on or about the date it bears, to-wit: December 3, 1945.

3. That at the time the petition for allowance of appeal was presented and the order allowing appeal entered there was presented to the Judge of the United States Circuit Court of Appeals, Eighth Circuit, assignment of error No. 1, challenging the decision of both the United States District Court of Iowa, Southern District, Central Division, and the United States Circuit Court of Appeals, Eighth Circuit, holding that Chapter 267, Section 1, Law of the 50th General Assembly of Iowa, violated the constitution of the United States.

4. That after order allowing appeal was entered there was filed in the United States Circuit Court of Appeals, Eighth Circuit, an additional assignment of error designated as assignment of error No. 2, asking the review of the United States Supreme Court on the matter of the sufficiency of the evidence to show that Appellee was engaged in commerce and therefore within the coverage of the Fair Labor Standards Act.

5. The Court is without jurisdiction to entertain assignment of Error No. 2, for the following reasons:

(a) It was not presented to and considered by the Eighth Circuit Court of Appeals at the time order allowing appeal was entered.

(b) Assignment of Error No. 2 presents only alleged error based upon a finding of fact by both the United States District Court of Iowa and the Eighth Circuit Court of Appeals.

(c) There is a misjoinder in errors assigned, one at law under assignment of Error No. 1 and one of fact under assignment of Error No. 2.

(d) The Supreme Court of the United States is without jurisdiction to review, consider or determine assignment of Error No. 2, for the reason that the only possible right to prosecute an appeal is derived from Section 240(b) of the Judicial Code, 28 U. S. C. A., Section 347(b) which limits the Supreme Court upon appeal to the consideration of questions of law, only, and assignment of Error No. 2 would require the review of questions of fact, as distinguished from the question of law.

6. Chapter 267, Section 1, law of the 50th General Assembly of Iowa, urged as a defense by Appellant in both the United States District Court and the Eighth Circuit Court of Appeals, was between the time of the decision in the United States District Court of Iowa and its affirmance by the Eighth Circuit Court of Appeals on October 29, 1945, repealed by the 51st General Assembly of the State of Iowa, by the enactment into law of Chapter 222, laws of the 51st General Assembly of the State of Iowa and which Act became effective by operation of law on July 4, 1945. That Chapter 222, laws of the 51st General Assembly of the State of Iowa is as follows:

"Chapter 222
Limitation of Actions
S. F. 94

An Act to repeal chapter 267, laws of the Fiftieth General Assembly, fixing the period of limitations within which actions may be begun with respect to certain claims arising out of Federal Statutes, when no period of limitation is prescribed therein, and providing for a period of limitation for claims for wages.

Be It Enacted by the General Assembly of the State of Iowa:

Section 1. That Chapter 267, laws of the Fiftieth General Assembly be and the same is hereby repealed.

Sec. 2. Subsection five (5) of Section eleven thousand seven (11007) is amended by striking the period (.) following the word "years" in line seven (7) and adding the following: "except as provided by subsection nine (9)."

Sec. 3. Section eleven thousand seven (11007) is further amended by adding a new subsection as follows: "9. Those founded on claims for wages or for a liability or penalty for failure to pay wages, within two years. Any present existing causes of action must be commenced in any court of competent jurisdiction within six (6) months after the effective date * of this act."

Approved March 29, 1945.

That in support of the legislative fact above set forth, there is hereto attached marked Exhibit "A," and by said reference made a part hereof, the affidavit of Walter F. Maley, one of Counsel for Appellee herein.

7. That by reason of repeal of the law upon which Appellant relies, both in the United States District Court and in the Circuit Court of Appeals, Eighth Circuit, the present appeal, including both assignments of error constitute and present a moot question only, neither requiring nor justifying review, consideration or determination by the Supreme Court of the United States.

(a) Section 1, Chapter 267, Laws of the 50th General Assembly of Iowa, relates solely to matters of procedure, in which a litigant has no vested right. The repeal of that statute upon which Appellant relies makes it unnecessary to consider the moot question thus presented upon appellant's proposed appeal, as to whether such statute was enforceable in the Federal Court.

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* Effective July 4, 1945.

(b) Inasmuch as the statute upon which Appellant relies as a defense no longer has any legal existence, if the Supreme Court of the United States should entertain this appeal, it would be passing upon a mere academic question affecting no one's substantial rights, inasmuch as the repeal of the statute effectually deprives the Appellant of any defense based upon such statute.

(c) If this appeal were to be prosecuted and determined by the Supreme Court of the United States and this cause reversed, it would avail the Appellant nothing as the statute upon which he relies as a defense would not be available to him in the lower Court in the event of a re-trial of the case in the United States District Court, as it has been repealed and the Supreme Court of the United States will not entertain, consider or pass upon moot questions.

8. There is no jurisdiction vested in the Supreme Court of the United States to entertain an appeal from the decision of the Circuit Court of Appeals in this cause for the reason that the only possible statute upon which Appellant could rely is Section 240(b) of the Judicial Code, 28 U. S. C. A., Section 347(b) which authorizes an appeal only where the validity of a statute of a State is drawn in question, and the decision is against its validity, as neither the United States District Court nor the Circuit Court of Appeals for the Eighth Circuit passed upon or determined the validity of Section 1, Chapter 267, Laws of the 50th General Assembly of Iowa, upon which Appellant relies as a defense, but the only holding of the United States District Court and of this Court was to the effect that such statute was not enforceable in the Federal Courts. The United States District Court said in part, "It is not a question of constitutionality, but it is an attempt on the part of the legislature of the State of Iowa to enter a field

of legislation exclusively within the authority of the Congress of the United States," and the Circuit Court of Appeals said, "We conclude that this special statute of Limitations cannot be enforceable in Federal Court. The judgment appealed from is therefore affirmed."

Hence the validity of the statute has never been "drawn in question," in this cause, within the meaning, intention and contemplation of the provisions of Section 240(b) of the Judicial Code and there is no right to prosecute an appeal to the Supreme Court of the United States in this cause.

9. There has been no decision by the United States District Court, for the Southern District of Iowa, or the United States Circuit Court of Appeals for the Eighth Circuit, holding unconstitutional or invalid the provisions of Chapter 267, Laws of the 50th General Assembly of Iowa, upon which Appellant attempted to rely as a defense. Therefore, the decision of the Circuit Court of Appeals for the Eighth Circuit is final and binding and conclusive in this cause and no appeal may be prosecuted from its decision to the Supreme Court of the United States.

10. In view of the fact that Section 240(b) of the Judicial Code is not applicable or available to the Appellant, there is no avenue open to the Appellant to take an appeal in this cause to the Supreme Court of the United States from the decision of the Circuit Court of Appeals for the Eighth Circuit. The Petition for Rehearing having been denied, the Appellant has reached the end of the road in this litigation.

11. Neither the United States District Court nor the Circuit Court of Appeals has said that Chapter 267, Laws of the 50th General Assembly of Iowa, may not be successfully pleaded as a defense in the prosecution of a cause

of action pending in the State Courts of Iowa. Neither have said Courts said that the statute in question impinges upon, is contrary to, or in violation of the Constitution of the United States, or any of the amendments thereto, so as to deprive a litigant of the benefit of the provisions of such statute in litigation in the State Courts of Iowa. Therefore, the statute has not been held to be invalid within the intent and meaning of Section 240(b) of the Judicial Code and no appeal from the decision of the Circuit Court of Appeals may be taken to the United States Supreme Court in this cause.

Respectfully submitted,

GEORGE B. PORTER,
WALTER F. MALEY,
TED E. HARTUNG,
Counsel for Appellee.

EXHIBIT A

AFFIDAVIT OF WALTER F. MALEY, ATTORNEY AT LAW

STATE OF IOWA,
Polk County, *ss:*

I, Walter F. Maley, being first duly sworn, on oath depose and say that I am an attorney at law, in Des Moines, Iowa, and am now and have been actively engaged in the practice of my profession in the courts of Iowa for over twenty-five years last past. That I am familiar with the history of Chapter 267, Laws of the 50th General Assembly of the State of Iowa and that said Chapter 267 was repealed by Chapter 222, Acts of the 51st General Assembly of the State of Iowa and that said repealing statute became in full force and effect on the 4th day of July, A. D., 1945.

I further state that said Chapter 222 as set forth in the body of the within Motion is true and correct.

WALTER F. MALEY.

Subscribed in my presence and sworn to before me on this 17th day of December, A. D. 1945.

RUTH V. BAUSERMAN,
Notary Public in and for Polk County, Iowa.

[SEAL.]